In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1460

HENAULT MINING COMPANY, PETITIONER

v.

ED ZAIDLICZ, INDIVIDUALLY AND AS MONTANA STATE DIRECTOR OF THE BUREAU OF LAND MANAGEMENT, AND WALTER J. HICKEL, INDIVIDUALLY AND AS SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The Secretary of the Interior's opinion (Pet. App. 36–54)—affirming the Bureau of Land Management's reversal (Pet. App. 25–35) of the Hearing Examiner's decision (Pet. App. 1–24)—is reported at 73 I.D. 184. The district court's opinion (Pet. App. 55–71) is reported at 271 F.Supp. 474. The opinions of the court of appeals (Pet. App. 75–80, 82–84) are reported at 419 F.2d 766.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1969. A timely petition for rehearing

was denied on January 23, 1970. The petition for a writ of certiorari was filed on April 22, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States is entitled, under the Multiple Surface Uses Act of 1955, to manage the nonmineral surface resources of certain public lands on petitioner's failure to expose physically a valuable mineral deposit within the limits of its unpatented lode mining claims.

STATUTES INVOLVED

The statutes involved[1] are set forth in the Appendix (*infra*, pp. 7–9).

STATEMENT

Pursuant to Section 4 of the Multiple Surface Uses Act of 1955, *supra*, the Secretary of the Interior determined that the United States was entitled to manage the nonmineral surface resources on petitioner's unpatented lode mining claims because petitioner had failed to establish anything more than a geological inference that explorations at undetermined depths, and at substantial cost, might expose a continuation through its claims of a formation containing gold (in some form) actually found under adjacent lands mined by the largest gold producer in the United States. The Secretary observed that geological infer-

[1] Sections 1 and 2 of the Act of May 10, 1872, 17 Stat. 91, R.S. 2319 and 2320, 30 U.S.C. 22 and 23; Section 4 of the Multiple Surface Uses Act of 1955, 69 Stat. 368–369, 30 U.S.C. 612.

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ence standing alone has never been accepted as a sufficient substitute for the actual physical exposure of valuable minerals in determining what constitutes a "discovery". (Pet. App. 44–45, 48–49, 52–53.)

Petitioner then filed this action seeking reversal of the Secretary's decision. On cross-motions for summary judgment, the district court reversed, although seeming to agree that geological inference alone is insufficient to establish a discovery (Pet. App. 64).

On appeal, the court of appeals reversed the decision below and upheld the determination of the Secretary, stating, "No prudent man would proceed to the development of a mine on the surface showings we have here" (Pet. App. 78). Accordingly, the court concluded, "Henault's 'prudent man,' then, is not a prudent mine developer but a prudent prospector," (Pet. App. 78) seeking "a guarantee of patentability—an assurance in advance that win or lose in its search for mineral values it will get its fee title. Public land cannot be dispensed on such a basis." (Pet. App. 79). In so holding, the court reaffirmed (Pet. App. 79) petitioner's continued right, as recognized by the Secretary (Pet. App. 53–54), to explore, to use surface resources incidental thereto, and to make a valid discovery.

Petitioner's petition for rehearing—no judge of the full court requested a vote on the suggestion for rehearing *en banc*—was denied, with the court of appeals reasserting:

> No vein or lode containing valuable mineral deposits has yet been discovered. The dikes that have been discovered through outcroppings

simply constitute an indication that a vein or lode, yet unexposed, may exist at depth. A reasonable prediction that valuable minerals exist at depth will not suffice as a "discovery" where the existence of these minerals has not been physically established.

ARGUMENT

The decisions of the court of appeals are clearly correct, accord with the underlying purposes of the Multiple Surface Uses Act of 1955, *supra*,[2] and are supported by a long history of consistent administrative and judicial construction of the relevant statutes. Further, no conflict of decisions exists, either within or among the different circuits.

To establish a valid "discovery," the mineral lode claimant is required to expose physically, within the limits of his claim, a vein or lode of mineral-bearing rock in place, possessing in and of itself a present or prospective value for mining purposes. Speculation, hope, and the like have been held insufficient time and time again. This standard has been stated repeatedly by this Court and others.[3]

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[2] See *Funderberg* v. *Udall*, 396 F. 2d 638, 639–640 (C.A. 9).

[3] *United States* v. *Iron Silver Mining Co.*, 128 U.S. 673, 676, 683–684; *Iron Silver Co.* v. *Mike & Starr Co.*, 143 U.S. 394, 402–403, 405–406, and dissenting opinion, 412, 421, 424–425, 430; *Sullivan* v. *Iron Silver Mining Co.*, 143 U.S. 431, 435–436; *Dahl* v. *Raunheim*, 132 U.S. 260, 263; *Mining Co.* v. *Tunnel Co.*, 196 U.S. 337, 360; *Cole* v. *Ralph*, 252 U.S. 286, 295; *Cameron* v. *United States*, 252 U.S. 450, 456, 459; *Udall* v. *Snyder*, 405 F. 2d 1179, 1180 (C.A. 10), certiorari denied, 396 U.S. 819; *Ranchers Exploration and Development Co.* v. *Anaconda Co.*, 248 F. Supp. 708, 714–720 (D. Utah).

In this case, the undisputed facts show petitioner has failed to uncover a valuable mineral deposit within the limits of its claims. Indeed, what mineralization has been found to exist was concededly valueless. (Pet. App. 37–40, 42, 44–45, 48–49). The geological information, even now underscored by petitioner as nothing more than a *"scientifically predicted ore body"* (Pet. 8), suggests merely that additional exploratory work be done at ever-increasing depths to ascertain whether a valuable deposit does in fact exist which, under the prudent-man standard, would prompt one to sustain the substantial costs involved in developing these lode mining claims. The Secretary's decision, however, as the court of appeals pointed out, does not preclude petitioner from continuing with such explorations.

Petitioner's "good faith" declarations and predictions (that exploration and development must be conducted at depths well below the surface because most of the Nation's surface and near-surface deposits have already been discovered) cannot change the fact that in some 20 years of opportunity petitioner has not yet "discovered" a valuable mineral deposit. Nor does it appear that any concentrated effort has been initiated to demonstrate that the adjacent Homestake gold formation does, as petitioner hopes, lie at depth within its claims. In these circumstances, it is plain petitioner's real contention is for substantial amendment to the mining laws effecting conveyance of public lands to private ownership. This Congress thus far has not seen fit to enact.

Even if we were to assume petitioner had physically exposed a mineral deposit within its claims, it is evi-

dent such exposure would fail to establish a valid "discovery" in the context of the present case. The evidence here is clear and undisputed that nothing of value has been uncovered. As recently declared by this Court, the prudent man theory requires a showing of "valuable" minerals, after the expense of extraction. *United States* v. *Coleman,* 390 U.S. 599. The Secretary and the court of appeals correctly applied this standard in determining petitioner was not entitled to the relief it sought under the circumstances of this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
SHIRO KASHIWA,
Assistant Attorney General.
S. BILLINGSLEY HILL,
RAYMOND N. ZAGONE,
Attorneys.

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APPENDIX

Section 1 of the Act of May 10, 1872, 17 Stat. 91, R.S. 2319, 30 U.S.C. 22, provides in pertinent part:

> That all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, * * * under regulations prescribed by law, and according to the local customs or rules of miners, in the several mining-districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Section 2 of the Act of May 10, 1872, 17 Stat. 91, R.S. 2320, 30 U.S.C. 23, provides:

> That mining-claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining-claim located after the passage of this act, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than

twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing at the passage of this act shall render such limitation necessary. The end-lines of each claim shall be parallel to each other.

Section 4 of the Multiple Surface Uses Act of 1955, 69 Stat. 368–369, 30 U.S.C. 612, provides:

(a) Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.

(b) Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: *Provided, however,* That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto: *Provided further,* That if at any time the locator requires more timber for his mining operations than is available to him from the claim after disposition of timber there-

from by the United States, subsequent to the location of the claim, he shall be entitled, free of charge, to be supplied with timber for such requirements from the nearest timber administered by the disposing agency which is ready for harvesting under the rules and regulations of that agency and which is substantially equivalent in kind and quantity to the timber estimated by the disposing agency to have been disposed of from the claim: *Provided further,* That nothing in this Act shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim.

(c) Except to the extent required for the mining claimant's prospecting, mining or processing operations and uses reasonably incident thereto, or for the construction of buildings or structures in connection therewith, or to provide clearance for such operations or uses, or to the extent authorized by the United States, no claimant of any mining claim hereafter located under the mining laws of the United States shall, prior to issuance of patent therefor, sever, remove, or use any vegetative or other surface resources thereof which are subject to management or disposition by the United States under the preceding subsection (b). Any severance or removal of timber which is permitted under the exceptions of the preceding sentence, other than severance or removal to provide clearance, shall be in accordance with sound principles of forest management.

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